Supreme Court, U.S.
FILED

No. 91315 NOV 24 1999

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IN THE
SUPREME COURT OF THE UNITED STATES

FIZZANO BROTHERS CONCRETE PRODUCTS, INC.,

Petitioner,

v.

DAVID S. SANTERIAN, HARRY G. SANTERIAN, ALBERT SANTERIAN, AND LINDA SANTERIAN,

Respondents.

On Petition for Writ of Certiorari
To The Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

BY: ALBERT A. CIARDI, JR., ESQUIRE
Ciardi, Maschmeyer & Karalis, P.C.
1900 Spruce Street
Philadelphia, PA 19103
(215) 546-4500
Counsel of Record

PAUL A. BUCCO, ESQUIRE
ROBERT D. ARDIZZI, ESQUIRE

46 pp

QUESTIONS PRESENTED

1. Whether the Pennsylvania Mechanics' Lien Law violates the equal protection guarantee of the Fourteenth Amendment to the United States Constitution because it arbitrarily denies mechanics' lien rights to certain contractors who supply labor and materials to a project while granting such rights to other similarly-situated contractors.

2. Whether the lien waiver provisions of the Pennsylvania Mechanics' Lien Law violate the due process guarantee of the United States Constitution because they delegate legislative authority to private citizens by allowing them to waive the lien rights of third parties.

3. Whether the lien waiver provisions of the Pennsylvania Mechanics' Lien Law violate the procedural due process guarantee of the United States Constitution because they deprive contractors such as Petitioner-Fizzano of their property right, i.e. a mechanics' lien, without notice and a hearing with a chance to be heard on the deprivation.

4. Whether the Pennsylvania Mechanics' Lien Law violates the procedural and substantive due process guarantees of United States Constitution because it arbitrarily and capriciously allows third parties to waive a contractor's right to a mechanics' lien, a recognized property right, without the consent or prior knowledge of the contractor.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED	i.
LIST OF PARTIES	iii.
TABLE OF AUTHORITIES	iv.
OPINIONS BELOW	1.
STATEMENT OF JURISDICTION	2.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3.
STATEMENT OF THE CASE	6.
REASONS FOR GRANTING THE WRIT	11.
CONCLUSION	21.

LIST OF PARTIES

Petitioner is Fizzano Brothers Concrete Products, Inc., a corporation organized under the laws of the Commonwealth of Pennsylvania.

Respondents are David S. Santerian, Harry G. Santerian, Albert Santerian and Linda Santerian.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Petitioner Fizzano Brothers Concrete Products, Inc., hereby discloses that it has no parent corporations and that no publicly held corporation owns 10% or more of the corporation's stock.

STATEMENT REGARDING APPLICABILITY OF 28 U.S.C. § 2403(b)

Pursuant to Supreme Court Rule 29.4(c), Petitioner Fizzano Brothers Concrete Products, Inc. hereby states that the constitutionality of a Pennsylvania statute is drawn into question in this matter and 28 U.S.C. § 2403(b) may apply.

TABLE OF AUTHORITIES

Cases	Page
Armstrong v. United States, 364 U.S. 40 (1960)	11,13
Bounds v. Nuttle, 181 Md. 400, 30 A.2d 263 (1943)	16
Fuentes v. Shevin, 407 U.S. 67 (1971)	14
Gould, Inc. v. Dynalectric Co., 435 A.2d 730 (Del. 1981)	17
Hey Kiley Man, Inc. v. Azalea Gardens Apartments, 333 So.2d 48 (1976),	17
Kayfield Construction Corp. v. Glazed Block Corp., 261 N.Y.S. 202 (1965).	17
National Glass , Inc. v. J. C. Penny Properties, Inc., 650 A.2d 246 (Md. 1994).	19
Reisterstown Lumber Co. v. Reeder, 224 Md. 499, 168 A.2d 385 (1961).	16
Sante Fe Natural Tobacco Company, Inc. v. Judge, 963 F.Supp. 437, 440 (1997)	13

State Board of Chiropractic Examiners v. Life Fellowship of Pa., ... 13
441 Pa. 293, 272 A.2d 478 (1971)

Van Stone v. Stillwell & Bierce Manufacturing Co., ... 12
142 U.S. 128 (1881)

Washington ex rel. Seattle Title Trust Company v. Roberge, ... 13
278 U.S. 116 (1928)

Constitutional Provisions

United States Constitution, Fourteenth Amendment 6, 8, 12, 13

State Statutes

Pennsylvania

49 P.S. §1401 ..... 7, 12, 20

49 P.S. §1402 ..... 7, 12, 20

49 P.S. §1303(a) 7

49 P.S. §1201(4) 7

49 P.S. §1201(5) 7

Delaware

25 Del.C. §2706(b) 18

25 Del.C. §2702(a) 17

Maryland

Md. Code, Real Property Art. §9-113..... 19

Md. Code §9-101(g)..... 16

New Jersey

N.J.S.A. 2A: 44A-1 *et seq.* 16

Other Sources

Walsh, Pennsylvania Mechanics' Liens,
§1.01, p.1-3 (1990)..... 12

OPINIONS BELOW

The opinion and order of the Superior Court of Pennsylvania were not reported and are reprinted in the Appendix at 1a.

The opinion and order of the Supreme Court of Pennsylvania in which the court declined to exercise discretionary review of this matter, were not reported and are reprinted in the Appendix at 17a.

The opinions and orders of the trial court, the Court of Common Pleas of Montgomery County, were not reported and are reprinted in the Appendix at 11a and 16a.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on August 26, 1999. This petition for writ of certiorari has been filed within ninety days of that date. The Supreme Court of the United States has jurisdiction to review the decision of the state supreme court pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution - 14th Amendment - Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Pennsylvania Mechanics' Lien Law, 49 P.S. §1201 (4) and (5)

> Definitions. The following words, terms and phrases when used in this act shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:
>
> (4) "Contractor" means one who, by contract with the owner, express or implied, erects, constructs, alters or repairs an improvement or any part thereof or furnishes, labor, skill or superintendence thereto; or supplies or hauls materials, fixtures, machinery or equipment reasonably necessary for and actually used therein; or any or all of the foregoing, whether as superintendent, builder or materialman. The term also includes an architect or engineer, who by contract with the owner,

express or implied, in addition to the preparation of drawings, specifications and contract drawings also superintends or supervises any such erection, construction, alteration or repair.

(5) "Subcontractor" means one who, by contract with the contractor, express or implied, erects, constructs, alters or repairs an improvement or any part thereof; or furnishes, labor, skill or superintendence thereto; or supplies or hauls materials, fixtures, machinery or equipment reasonably necessary for and actually used therein; or any or all of the foregoing, whether as superintendent, builder or materialman. The term does not include an architect or engineer, who contracts with a contractor or subcontractor, or a person who contracts with a subcontractor with the owner, express or implied, in addition to the preparation of drawings, specifications and contract drawings also superintends or supervises any such erection, construction, alteration or repair.

Pennsylvania Mechanics' Lien Law, 49 P.S. §1303(a)

(a) Persons Other Than Contractors or Subcontractors. No lien shall be allowed in favor of any person other than a contractor or subcontractor, as defined herein, even though such person furnishes labor or materials to an improvement.

Pennsylvania Mechanics' Lien Law, 49 P.S. §1401

A contractor or subcontractor may waive his right to file a claim by a written instrument signed by him or by any conduct which operates equitable to estop such contractor or subcontractor from filing a claim.

Pennsylvania Mechanics' Lien Law, 49 P.S. §1402

A written contract between the owner and contractor or a separate written instrument signed by the contractor, which provides that no claim shall be filed by anyone, shall be binding; but the only admissible evidence thereof, as against a subcontractor shall be proof of actual notice thereof to him before any labor or materials were furnished by him; or proof that such contract or separate written instrument was filed in the office of the Prothonotary prior to the commencement of the work upon the ground or within ten (10) days after the execution of the principal contract or not less than ten (10) days prior to the contract with the claimant subcontractor, indexed in the name of the contractor as defendant and the owner as plaintiff and also in the name of the contractor as plaintiff and the owner as defendant. The only admissible evidence that such a provision has, notwithstanding its filing, been waived in favor of any subcontractor shall be a written agreement to that effect signed by all those who, under the contract, have an adverse interest to the subcontractor's allegation.

STATEMENT OF THE CASE

This case concerns the deprivation of a recognized property right, a mechanics' lien, by a Pennsylvania statute which was enacted to protect the interests of persons and entities engaged in the construction industry, such as the Petitioner.

In Pennsylvania, one who furnishes labor or materials used in the construction or renovation of a structure is granted the right to file a mechanics' lien claim for the value of that which was furnished but for which no payment was received. This right is conferred by statute, the Pennsylvania Mechanics' Lien Law of 1963, 49 P.S. §1101 *et seq.* (hereinafter "the PMLL"). The PMLL is a unique law because it is the means by which some persons and entities acquire lien rights to protect their interests but it is also the means by which others are denied such rights despite being similarly-situated to the latter class of claimants. The PMLL is also unique in the sense that it allows private citizens to dictate who may possess the lien rights created by the legislature by granting them the power to waive the lien rights of third parties. It was these provisions of the PMLL which deprived Petitioner of its rights under the Fourteenth Amendment to the United States Constitution thereby compelling it to file this petition.

The facts pertinent to this case began when the Petitioner, Fizzano Brothers Concrete Products, Inc. (hereinafter "Fizzano") furnished materials consisting of concrete block and related materials in connection with the construction of a commercial retail store known as the Soundex Electronics building in Willow Grove, Montgomery County, Pennsylvania (hereinafter the "Property"). The Respondents, David S. Santerian, Harry G. Santerian, Albert Santerian and Linda Santerian (the "Santerians") are the owners of the Property.

The Santerians entered into a contract with the general contractor, Mid-Atlantic Corporation, for the construction of the

building. In turn, Mid-Atlantic subcontracted the masonry construction work to Laad Masonry, Inc. (hereinafter "Laad"). Laad then purchased the concrete block and related materials it needed to perform its work on the Property from Fizzano. Fizzano's concrete block was delivered directly to the project site and was used to construct the building owned by the Santerians.

In the lexicon of the construction industry, Fizzano is considered a "third-tier contractor" because of its proximity to the Santerians in the project's hierarchy. Mid-Atlantic is deemed a first-tier contractor because it contracted directly with the Santerians. Laad Masonry, having contracted with Mid-Atlantic, is a second-tier contractor. These designations are important under the PMLL because they define which contractors are entitled to mechanics' lien rights. Specifically, section 1303(a) of the PMLL denies lien rights to anyone other than a contractor or a subcontractor. According to the definition section of the statute, section 1201 (4) and (5) respectively, a contractor is one who has a contract with the owner and a subcontractor is one who has a contract with a contractor. Therefore, Fizzano, as a subcontractor to a subcontractor, is denied lien rights under the statute.

Prior to Fizzano's involvement with the Project, the Santerians and Mid-Atlantic executed a Waiver of Liens for the Project and filed the same with the Prothonotary of Montgomery County, Pennsylvania. Pursuant to this Waiver of Liens, which was authorized by section 1401 and 1402 of the PMLL, Mid-Atlantic agreed, for itself and on behalf of all of its subcontractors and suppliers, that no mechanics' lien claims would be filed against the Property. Thus, the Waiver of Liens purported to waive not only Mid-Atlantic's lien rights but also those of all the subcontractors and suppliers working on the project, notwithstanding the fact that the Santerians and Mid-Atlantic were the only signatories to the document.

Although Fizzano fully complied with its obligations to

Laad by producing and delivering the concrete materials for the project, Laad failed to pay Fizzano a balance of $19,067.15. On November 26, 1996, Fizzano served a formal Notice of Intention to File a Mechanics' Lien Claim to the Santerians indicating the materials supplied, the amount owed and Fizzano's intention to file a mechanics' lien against the Property.

On December 27, 1996, Fizzano filed a Mechanics' Lien Claim (hereinafter "the Lien") in the Court of Common Pleas of Montgomery County, Pennsylvania, asserting a lien against the Santerians' Property in the amount of $19,075, the balance remaining for the materials supplied by Fizzano. The Lien conformed to all of the procedural and substantive requirements of the PMLL and was indexed as a lien against the Property. In response, the Santerians filed Preliminary Objections[1] to the Lien arguing therein that the Lien was legally deficient because Fizzano fell outside the class of claimants authorized by the PMLL to file a lien and because the lien rights of all contractors had been waived by the Waiver of Liens executed by the Santerians and the general contractor, Mid-Atlantic.

Fizzano filed a timely response to the Preliminary Objections on February 11, 1997 in which it argued that certain provisions of the PMLL violated the Pennsylvania and United States Constitutions.[2] Specifically, Fizzano argued that the provision of the Mechanics' Lien Law which limited claimants to first and second tier contractors while denying those same rights to third-tier contractors such as Fizzano, violated the equal

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[1] Preliminary Objections are a form of pleading permitted by the Pennsylvania Rules of Civil Procedure which are analogous to a motion to dismiss filed under Federal Rule of Civil Procedure 12.

[2] Fizzano's arguments relating to the alleged violations of the Pennsylvania Constitution are not raised in this petition.

protection clause of the Fourteenth Amendment to the United States Constitution. Fizzano also argued that the provisions of the PMLL which allow the owner and general contractor to waive the lien rights of other contractors and suppliers such as Fizzano violated the due process clause contained in the Fourteenth Amendment.

On February 26, 1998, the trial court issued an Order in favor of the Santerians rejecting the constitutional arguments and striking the Lien.[3] Pet. App. 11a. The trial court entered a second Order on October 11, 1998 clarifying the earlier Order. Pet. App. 16a.

Fizzano then appealed the aforementioned Orders to the Pennsylvania Superior Court. The Superior Court affirmed the trial court's decision and rejected Fizzano's constitutional challenges to the PMLL. Pet. App. 1a. Although the Superior Court refused to declare the PMLL unconstitutional as requested by Fizzano, it did note that the case involved a fundamental right attributable to Fizzano's claims which it suggested should be pursued "in a higher court". Pet. App. 9a.

Seizing upon the apparent mandate contained in the Superior Court's opinion, Fizzano filed a timely petition for allowance of appeal to the Pennsylvania Supreme Court. Fizzano requested the Pennsylvania Supreme Court to review the lower courts' denial of the constitutional challenges to the PMLL. Specifically, Fizzano argued that the PMLL is unconstitutional because it: (1) denies liens rights to claimants which are similarly-situated with those who are granted such

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[3] The trial court also sanctioned Fizzano and its counsel for filing an "arbitrary and vexatious" claim against the Santerians. However, the appellate court disagreed and because the decision as to the sanctions was reversed by the Pennsylvania Superior Court it is not at issue in this petition.

rights (2) delegates legislative authority to private citizens by allowing them to waive the lien rights of others which are conferred by the statute and (3) permits the general contractor and owner to waive the lien rights of third parties such as Fizzano without their consent or knowledge. On August 26, 1999, the Pennsylvania Supreme Court entered an Order denying Fizzano's petition for allowance of appeal thereby refusing to hear the appeal. Pet. App. 17a.

Fizzano files this petition for writ of certiorari so that the Court may review the decisions of the Pennsylvania courts and declare the applicable provisions of the PMLL violative of the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS OF THE PENNSYLVANIA COURTS INFRINGE UPON THE MOST BASIC OF CONSTITUTIONAL PROTECTIONS, EQUAL PROTECTION AND DUE PROCESS, AND THEREFORE THE DECISIONS SHOULD BE ADDRESSED BY THE COURT.

This case is one of first impression and has important and far-reaching implications not only to Fizzano but also to all persons and entities who provide labor or materials to construction projects in Pennsylvania.

A contractor's most important asset is the labor and materials it supplies to a particular project. Mechanics' liens were designed to protect this valuable asset. The Court has expressly recognized this by concluding that a mechanics' liens is a property right worthy of constitutional protection. *Armstrong v. United States*, 364 U.S. 40 (1960). Therefore, any statute, including the PMLL, which arbitrarily and capriciously abridges this property right must be reviewed and must be declared violative of the United States Constitution.

Fizzano has raised a claim under the equal protection guarantee of the United States Constitution because the Mechanics' Lien Law arbitrarily and capriciously treats similarly-situated claimants differently. Although Fizzano unquestionably supplied materials to the project, it was denied lien rights simply because the materials were supplied to a subcontractor, Laad, rather than the general contractor, Mid-Atlantic, both of whom possessed lien rights. Contrary to the lower courts' holdings, Fizzano's proximity to the owner has no bearing on whether it supplied materials to the project and

certainly does not provide a rational basis to differentiate among those who do supply labor and materials to a project.

Mechanics' liens were created to protect those who supply labor and materials from being harmed by unscrupulous owners and contractors. Walsh, Pennsylvania Mechanics' Liens, §1.01, p.1-3 (1990) (citing *Van Stone v. Stillwell & Bierce Manufacturing Co.*, 142 U.S. 128 (1881) (the right to a mechanics' liens is created by the owner's use of the labor and materials supplied by the lienor)). However, the Pennsylvania Superior Court turned this reasoning upside down by holding that lien rights should be limited to protect owners from "the potential for unscrupulous claims" by contractors. Pet. App. 5a. Because the PMLL treats members of the class, i.e., those supplying labor and materials, differently, the statute improperly denies Fizzano a recognized property right in violation of the equal protection clause. Therefore, Fizzano has presented a valid issue for appeal as to the constitutionality of the PMLL under the Constitution and seeks a review of the lower courts' decisions.

Fizzano has also raised constitutional issues regarding the provisions of the PMLL which permit the general contractor and owners to waive the lien rights of all contractors and suppliers on the project. Mid-Atlantic and the Santerians drafted, signed and filed the Waiver of Liens for the Soundex project, without the knowledge, consent or input of any of the other contractors and suppliers, including Fizzano. According to the PMLL, the effect of this Waiver of Liens is that no one who supplied labor and materials to the project could file a mechanics' lien even if they were never paid for their work because their rights were waived by the owners and general contractor. As such, Fizzano was bound by a contract to which it was not a party.

Under these circumstances, the waiver provisions of the PMLL, sections §1401 and 1402, clearly violate the substantive due process guarantee contained in the Fourteenth Amendment to

the Constitution. As set forth above, a mechanics' lien is a property right which is subject to constitutional protection. *Armstrong v. United States*, supra. The lien waiver provisions arbitrarily and capriciously take away this property right from Fizzano and similarly-situated contractors based upon a document to which they were not parties. The arbitrariness of these provisions is best exemplified by the trends in our surrounding states, New Jersey, Delaware and Maryland, where lien waivers have been abolished as being void against public policy. See, Section II, *infra*. Unfortunately for thousands of contractors who work in Pennsylvania, the Pennsylvania courts have refused to recognize the unconstitutionality of the lien waiver provisions of the PMLL which not only offend traditional contract law but, more importantly, abridge a recognized property right.

The lien waiver provisions also infringe on the substantive due process rights of Fizzano and similar contractors by unconstitutionally delegating a legislative function to private citizens. The mechanics' lien is a property right conferred on certain contractors by the legislature. However, the legislature has provided the general contractor and owners with unfettered discretion as to who can receive the benefits of this property right. These private citizens are empowered by the statute to waive the lien rights of everyone who provides labor and materials to the project. No controls or safeguards are contained in the statute to ensure that the waiver is grounded in fact or reason or even that it is carried out fairly. Because the statute allows private citizens to strip away the property rights of other citizens, arbitrarily and even for self-serving reasons, it must be struck down as an unconstitutional delegation of legislative authority under the Fourteenth Amendment to the Constitution. See, *Washington ex rel. Seattle Title Trust Company v. Roberge*, 278 U.S. 116 (1928); *Sante Fe Natural Tobacco Company, Inc. v. Judge*, 963 F.Supp. 437, 440 (1997); *State Board of Chiropractic Examiners v. Life Fellowship of Pa.*, 441 Pa. 293, 272 A.2d 478 (1971)

The lien waiver provisions of the PMLL also violate the procedural due process guarantee of the United States Constitution by permitting the owners and general contractor to waive Fizzano's property right without prior notice and without a hearing, or at least an opportunity to be heard on the issue. See, *Fuentes v. Shevin*, 407 U.S. 67 (1971). In *Fuentes*, this Court declared the Pennsylvania replevin statute unconstitutional as a violation of procedural due process because it permitted Pennsylvania citizens to lose their rights in property without prior notice or a hearing. This case is closely analogous to *Fuentes* because Fizzano was denied its property right, its mechanics' lien, without a hearing or an opportunity to be heard on the issue. Because of the similarity between the cases, the Court should review the decisions of the lower court to ensure that Fizzano's constitutional rights are not being arbitrarily denied.

The Pennsylvania Superior Court recognized the importance of the constitutional claims made by Fizzano in this case by noting in its opinion that the claims involved a "fundamental right" which the Superior Court stated should be pursued "in a higher court". Pet. App. 9a. Despite recognizing this fundamental right, the Superior Court declined to address the issue, choosing instead to hold that Fizzano had no standing to challenge the lien waiver provisions of the PMLL because it was not "one of the persons permitted to file a claim and therefore the waiver agreement has no application to it." Pet. App. 6a. However, the Superior Court overlooked the fact that Fizzano also argued that but for the violation of the equal protection guarantee of the Constitution, it would have been included in the class of eligible claimants. By holding that Fizzano lacks standing to challenge the lien waiver provisions, the Pennsylvania Superior Court incorrectly presupposed that the PMLL's denial of lien rights to third-tier contractors such as Fizzano is valid. For the reasons set forth above, this analysis is incorrect because the exclusion of Fizzano as an eligible claimant is the result of the denial of its equal protection rights.

The denial of Fizzano's constitutional rights was compounded by the Pennsylvania Supreme Court's decision to deny Fizzano's petition for allowance of appeal. The decisions from the lower courts in this case create a clear anomaly. While the Pennsylvania Superior Court recognized that this case involved a fundamental right which was to be addressed by a higher court, the Pennsylvania Supreme Court refused to decide, or even hear, the case. Thus, while Fizzano's constitutional rights have been recognized by the one Pennsylvania court, there has been no decision made by any court concerning the effect of the PMLL on those constitutional rights. Moreover, no explanation was provided by the Pennsylvania Supreme Court for declining to review the matter. Given the significance of the rights at stake, the Court must review the issue and decide whether the PMLL violates Fizzano's constitutional rights.

II. THE COURT SHOULD REVIEW THIS CASE BECAUSE THE DECISIONS OF THE PENNSYLVANIA COURTS ARE IN CONFLICT WITH THE LAWS OF THE STATES SURROUNDING PENNSYLVANIA.

Presently, the PMLL stands in stark contrast to the laws of the jurisdictions bordering Pennsylvania with respect to the claims raised by Fizzano in this action. During the course of the past ten years, significant changes have been made in the mechanics' lien statutes of these jurisdictions. The laws of these jurisdictions point out the arbitrariness of the PMLL and the decisions of the lower courts in this case.

Amendments to the Construction Lien Law in New Jersey in 1993 granted mechanics' lien rights to all contractors and subcontractors as defined by the statute. A "contractor" is one

who contracts directly with the owner while a "subcontractor" is defined as a "person providing work or services in connection with the improvement of real property pursuant to a contract with a contractor or pursuant to a contract with a subcontractor in direct privity of contract with a contractor". Similarly, the law defines a supplier as one who supplies materials to an owner or contractor. N.J.S.A. 2A: 44A-1 *et seq*. Thus, the New Jersey law allows third-tier contractors such as Fizzano to file and pursue a lien against the property to which it furnished materials.

The Maryland Mechanics' Lien Law also provides lien rights to all contractors and subcontractors. However, its definition of "subcontractor" includes all persons who have a contract with anyone other than the owner or his agent. Md. Code §9-101(g). Therefore, the lien rights granted by the Maryland statute also extend to third-tier contractors. The Maryland courts have explained the rationale of extending mechanics' lien rights beyond the prime contractor by stating:

> If the owners' failure to protect themselves against an impecunious contractor causes them to pay twice for materials, it is their own fault. The mechanics' lien law was passed to cover just such a situation and to protect materialmen. The theory of it is that the owner gets the benefit of the materials, and he has the control of the money. If he negligently and carelessly pays the money out to the contractor without taking precautions to see that it is applied to the payment of the materials which go into the building, then he must stand the loss rather than the materialman, who has no opportunity to protect himself once he has delivered the materials.

Bounds v. Nuttle, 181 Md. 400, 30 A.2d 263 (1943); *Reisterstown Lumber Co. v. Reeder*, 224 Md. 499, 168 A.2d 385 (1961). This analysis reflecting the true purpose of the

mechanics' lien statutes, i.e., the protection of the contractors, demonstrates the fallacy of the Pennsylvania Superior Court's decision in the case *sub judice* which states that lien rights should be limited to first and second tier contractors to protect owners from "unscrupulous claims" by contractors. Pet. App. 5a.

The Delaware Mechanics' Lien Law provides that anyone providing labor or material in the erection, alteration or repair of any structure pursuant to a contract with the owner, a contractor or a subcontractor is permitted to file a mechanics' lien against the property. 25 Del.C. §2702(a). The Delaware Supreme Court has held that the lien rights created by the statute extend to those who supply materials to a subcontractor, but no further. *Gould, Inc. v. Dynalectric Co.*, 435 A.2d 730 (Del. 1981). Therefore, the decision of the Pennsylvania Superior Court in this case also contradicts the decisions of Delaware which permit a third-tier supplier, such as Fizzano, to file a mechanics' lien.

In New York, the courts have held that a materialman to a sub-subcontractor was permitted to file a mechanics' lien claim because the law permits liens by those furnishing materials to a contractor or his immediate subcontractors. See, *Kayfield Construction Corp. v. Glazed Block Corp.*, 261 N.Y.S. 202 (1965).

Finally, although not from a neighboring jurisdiction, a Florida appeals court decision explicitly demonstrates the inherent arbitrariness of the PMLL to the extent that it denies lien rights to third-tier contractors such as Fizzano. In *Hey Kiley Man, Inc. v. Azalea Gardens Apartments*, 333 So.2d 48 (1976), a Florida appeals court reversed a trial court decision that had denied a mechanics' lien claim because the lower court believed the third-tier claimant was beyond the protection of the statute. The appellate court found that the statute defined a subcontractor as anyone not in privity with the owner. More importantly, the court also stated that it saw no sense in drawing an arbitrary line

which would cut out potential claimants simply because of the degrees of remoteness between the claimant and the owner, assuming the claimants compliance with the protective notice requirement for perfecting a lien.

These decisions and statutes from the jurisdictions surrounding Pennsylvania clearly demonstrate that there is no rational basis for the PMLL's unequal treatment of second and third-tier contractors in terms of mechanics' lien rights. Each of these jurisdictions has either explicitly stated that such a distinction is arbitrary or fashioned their laws in recognition of the fact that materialmen to a subcontractor provide the materials that are necessary to the erection or alteration of the owners' building. Because the PMLL and the decisions of the lower courts in this case are in direct contradiction to these jurisdictions, the Court should review this case to determine whether the PMLL arbitrarily and capriciously denies Fizzano its recognized property right.

The decisions of the Pennsylvania courts in this case are also contradicted by the laws and decisions of the neighboring jurisdictions with respect to the lien waiver provisions of the PMLL.

In 1992, Delaware amended its mechanics' lien law by abolishing all prospective lien waivers. The amended Delaware statute states:

> Any contract, any agreement or understanding whereby the right to file or enforce any lien created under this chapter is waived, shall be void as against public policy and wholly unenforceable.

25 Del.C. §2706(b) (effective July 2, 1992). Similarly, when New Jersey enacted its Construction Lien Law in 1993, it expressly abolished all lien waivers.

Perhaps the clearest illustration of the unconstitutionality of the PMLL's waiver provisions is exhibited by a decision from the highest court in Maryland, a jurisdiction neighboring Pennsylvania. *National Glass , Inc. v. J. C. Penny Properties, Inc.*, 650 A.2d 246 (Md. 1994).

National Glass involved a mechanics' lien claim filed by a subcontractor at a Maryland construction site. The subcontract at issue contained two relevant provisions. First, the subcontract provided that all disputes were to be submitted to arbitration in Pennsylvania. Second, the subcontract contained a provision whereby the subcontractor expressly waived all rights to file a lien for the work done on the project. *Id.*, 650 A.2d at 247.

The defendant argued that the court lacked jurisdiction over the matter because of the choice of law provision. The court disagreed and held that the mechanics' lien was valid notwithstanding the contractual provisions. Although the Maryland court agreed that parties were free to contract on such terms as they may agree, it nevertheless held that the choice of law provision could not be enforced "if application of Pennsylvania law is contrary to a fundamental policy of Maryland." *Id.* at 249. The Maryland Code provides that a contract between a contractor and subcontractor for the construction or repair of a building, structure or improvement "may not waive or require the subcontractor to waive the right to: claim a mechanic's lien" and that any such provision "made in violation of this section is void as against the public policy of this State." *Id.* at 250 (citing Md. Code, Real Property Art. § §9-113). Accordingly, the Maryland court refused to enforce the choice of law clause in the subcontract because to do so would entail recognizing the lien waiver which, in turn, would "violate a fundamental policy of Maryland." *Id.* at 250.

The foregoing analysis clearly and unequivocally demonstrates the unconstitutional nature of the lien waiver provisions of the PMLL. The statute arbitrarily and capriciously

denied Fizzano its right to a mechanics' lien as articulated by the purpose of the mechanics' lien statute, itself and the well-reasoned arguments of Pennsylvania's sister states that such provisions offend all notions of public policy. Accordingly, the lien waiver statute embodied in sections 1401 and 1402 violates Fizzano's substantive due process rights and must be declared unconstitutional.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari and upon review, declare the applicable provisions of the Pennsylvania Mechanics' Lien Law violative of the Fourteenth Amendment to the Constitution.

Respectfully submitted,

BY: _____

ALBERT A. CIARDI, JR., ESQUIRE
Ciardi, Maschmeyer & Karalis, P.C.
1900 Spruce Street
Philadelphia, PA 19103
(215) 546-4500
Attorney for Petitioners

APPENDIX

Appendix A. March 11, 1999 Memorandum Opinion and Judgment of the Superior Court of Pennsylvania

Appendix B. February 26, 1998 Order of the Trial Court, the Court of Common Pleas of Montgomery County, Pennsylvania.

Appendix C. March 11, 1998 Order of the Trial Court, the Court of Common Pleas of Montgomery County, Pennsylvania.

Appendix D. August 26, 1999 Order, Per Curiam, of the Pennsylvania Supreme Court.

APPENDIX A.

MARCH 11, 1999 JUDGMENT AND MEMORANDUM OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA.

FIZZANO BROTHERS CONCRETE PRODUCTS, INC.,	:	IN THE SUPERIOR COURT PENNSYLVANIA
Appellant	:	
DAVID S. SANTERIAN, HARRY G. SANTERIAN, ALBERT SANTERIAN AND LINDA SANTERIAN,	:	
Appellees	:	No. 962 Philadelphia, 1998

Appeal from the Orders of February 26, 1998 and March 11, 1998, In the Court of Common Pleas, Montgomery County, Civil Division, at No. 96-22642.

BEFORE: JOHNSON, SCHILLER and BROSKY, JJ.

MEMORANDUM:

This appeal by Fizzano Brothers Concrete Products is from an order striking its Mechanics' Lien Claim and awarding sanctions in the form of attorney fees to appellees. Appellant raises constitutional challenges to the Mechanics' Lien Law of

1963,[1] and further contends the trial court erred in granting appellees' motion for sanctions. We affirm in part and vacate in part.

The underlying facts are essentially not in dispute. Sometime in early 1996 appellees entered into a contract with Mid-Atlantic Corporation for construction of a building on appellees' property. In connection with this project, Mid-Atlantic and appellees in March 1996 executed a waiver of liens agreement, wherein Mid-Atlantic relinquished the right to file a mechanics' lien claim on its own behalf as well as on behalf of all subcontractors. This waiver was duly filed with the prothonotary on March 18, 1996.

As general contractor for construction on appellees' building, Mid-Atlantic entered into a subcontractor agreement with Laad Masonry, Inc. for masonry work on the project. Appellant thereafter agreed to supply concrete and other materials to Laad for its work on the building. After completing delivery of the required materials between June and August 1996, however, appellant was not paid by Laad.

Appellant filed its Mechanics' Lien Claim against appellees on December 27, 1996. Appellees filed preliminary objections to the claim, contending first that there is no provision in the statute for such a filing by a sub-subcontractor, and in addition that the waiver of lien agreement by Mid-Atlantic precluded any and all such claims. Appellees also moved for sanctions in the form of reasonable attorney fees asserting the underlying claim was baseless. The trial court sustained the preliminary objections and directed that the claim be stricken,

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[1] 49 P.S. §§ 1101 ***et seq.***

and further entered an award of attorney fees to appellees.[2] The appeal followed.[3]

The Mechanics' Lien Law "provides a special remedy in favor of a unique class of creditors" and is therefore given strict construction. ***King's Oak Liquidators v. Bala Cynwyd Hotel Associates***, 592 A.2d 102, 103 (Pa. Super. 1991). An order sustaining preliminary objections to a mechanics' lien claim is appropriate only in cases which are clear and free from doubt. ***Mele Construction Co., Inc. v. Crown American Corp.***, 618 A.2d 956 (Pa. Super. 1992). Appellant contends that trial court erred in sustaining appellees' preliminary objections because doing so ignores fatal constitutional defects in the statute.[4]

The constitutional challenges raised in this appeal relate only to certain provisions of the Mechanics' Lien Law which limit the right to file a claim. First, in a novel argument, appellant contends the provisions which specify that only a contractor or first-level subcontractor may file a claim are violative of equal protection, because "second-tier" or sub-subcontractors are not given the same remedy.

Section 1303(a) of the statute provides that, "No lien shall be allowed in favor of any person other than a contractor or subcontractor, as defined herein, even though such person furnishes labor or materials to an improvement." The term

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[2] The trial court's order of March 11, 1998 was entered to clarify the award for sanctions entered as part of the February 26, 1998 order.

[3] The correspondence submitted after argument of this case in contravention of Pa.R.A.P. 2501(a) had not been considered. This court has, however, conducted a thorough review of the record in the disposition of this appeal.

[4] We note that the Attorney General has elected not to be heard in connection with this appeal. See Pa.R.A.P. 521 (a).

"subcontractor" is defined in Section 1201(5), as "one who, by contract with the contractor" provides construction and/or materials and "does not include ... a person who contracts with a subcontractor or with a materialman." Appellant contends this classification is arbitrary, and the disparate treatment of "similarly-situated" subcontractors violates the Equal Protection Clauses of the U.S. and Pennsylvania constitutions. Appellant's brief at 18.

Legislation enacted by the General Assembly carries a strong presumption of constitutionality, and the party challenging the constitutionality of any statute of any statute bears a heavy burden of demonstrating that the statute is clearly, palpably and plainly unconstitutional. *Commonwealth v. Burnsworth*, 543 Pa. 18, 669 A.2d 883 (1995). The constitutional right to equal protection guarantees that persons who are similarly situated are treated alike, and that any distinctions between persons are reasonably justified. *Commonwealth v. Bell*, 512 Pa. 334, 516 mA.2d 1172 (1986). Appellant concedes the classification scheme he challenges involves neither a suspect class nor a fundamental or important right, and therefore the test is whether any rational basis exists for the classification. *Id.* This test involves a two-step analysis. "First, we must determine whether the challenged statute seeks to promote any legitimate state interest or public value. If so, we must next determine whether the classification adopted in the legislation is reasonably related to accomplishing that articulated state interest[.]" *Curtis v. Kline*, 542 Pa. 249, 257, 666 A.2d 265, 269 (1995).

Appellant argues that there is no reasonable basis for distinguishing between a contractor or subcontractor and a "third-tier" subcontractor, and that the classifications created by the statute are therefore arbitrary. Appellant cites to the common practice in today's construction world where numerous specialized subcontractors perform the majority of work on a project, resulting in a large number of potential mechanics' lien claimants denied the opportunity to pursue this statutory remedy.

This argument, however, lends support to the logical premises that the property should be protected from claims which are remote and possibly not legitimate.

The classification of person permitted to file a claim is limited to those persons in privity with the property owner. The property owner has a duty to pay the contractor with whom he has an agreement; the contractor has a duty to pay all of its subcontractors with whom it has an agreement. The unique class of creditors who may avail themselves of a mechanics' lien claim must logically be limited, and the classification scheme accomplishing this limitation is logically and reasonably related to those persons with a relationship with the owner. As the trial court explained, the statutory classification "is rationally related to the purpose of holding the owner responsible for only those contractual payments that he is directly responsible for or over which he has direct control because of his contract with the general contractor." Slip op., 6/30/98, at 18. Certainly disputes over payment to and by sub-subcontractors are too remote to subject the property owner to a lien on his property. The potential for unscrupulous claims is clear. Moreover, the fact that a mechanics' lien is unavailable does not mean an un paid sub-subcontractor is without recourse. We conclude that the provisions of the Mechanics' Lien Law of 1963 which limit claims to contractors and subcontractors are not violative of equal protection.

Appellant's next constitutional argument is that the waiver of lien provision permitted by the statute violates due process. Section 1402 provides as follow:

> §1402. Waiver by contractor; effect on subcontractor
> A written contract between the owner and the contract or a separate written instrument signed by the contractor which provides that no claim shall be filed by anyone, shall be binding ... [provided

> the] written instrument was filed n the office of the prothonotary ... not less than ten (10) days prior to the contract with the claimant subcontractor[.]

49 P.S. §1402.

Appellant contends that because it was not a party to the waiver of lien agreement, the provision of the statute which makes the agreement binding on it and other subcontractors is arbitrary, contradicts the purpose of the law, and serves no rational purpose. However, in specifying the persons entitled to file a Mechanics' Lien Claim, the legislature necessarily also limited the persons bound by such waiver. Appellant is not one of the persons permitted to file a claim and therefore the waiver agreement has no application to it. As a result, the due process challenge may not be considered. "It is a fundamental principle of constitutional law that a challenge to a statute, may not be raised in the abstract but must find its basis in an injury to the party seeking to have the enactment declared constitutionally inform." *Commonwealth v. Bell, supra*, 512 Pa. at 342, 516 A.2d at 1177. Unless the person raising the constitutional question is harmed by the particular provision challenged, the issue will not be addressed. *Dwyer v. Dilworth*, 392 Pa. 123, 139 A.2d 653 (1958). Because we have determined both of appellant's constitutional challenges to the Mechanics' Lien Law of 1963 are without merit, we conclude the trial court did not err in granting appellees' preliminary objections and striking appellant's claim. [5]

We now turn to appellant's final argument that the trial court erred in awarding attorney fees to appellees.

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[5] The trial court did not address whether appellant complied with all of the notice requirements of the statute. We also declined to address that issue in light of our determination appellant was not entitled to file the claim.

> The statutory provision at 42 Pa.C.S. §2503)9) expressly permits a trial court to award reasonable counsel fees to a litigant when, *inter alia*, that litigant's opponent initiated the action arbitrarily, vexatiously *or* in bad faith. An opponent's conduct has been deemed to be "arbitrary" within the meaning of the statute if such conduct is based on random or convenient selection or choice rather than on reason or nature. An opponent also can be deemed to have brought suit "vexatiously" if he filed the suit without sufficient grounds in either law or in fact and if the suit served the sole purpose of causing annoyance. Finally, an opponent can be charged with filing a lawsuit in "bad faith" if he filed the suit for purposes of fraud, dishonestly, or corruption.

Thunberg v. Strause, 545 Pa. 607, 615, 682 A.2d 295, 299-300 (1996) (citations omitted) (emphasis in original). An award of attorney fees is not necessarily warranted merely because a litigant is unsuccessful or because a novel theory of law is advanced. *Id.* "The aim of the rule is to sanction those who knowingly raise, in bad faith, frivolous claims which have no reasonable possibility of success, for the purpose of harassing, obstructing or delaying the opposing party." *Dooley v. Rubin*, 618 A.2d 1014, 1018 (Pa. Super. 1993).

This court's scope of review is limited to a determination of whether the trial court abused its discretion in entering the award. *Id.*

Following an evidentiary hearing, the trial court found that the claim was "not truly a constitutional challenge" and that appellant filed its claim in an attempt to put pressure on appellees to pay appellant for the supplies it provided, notwithstanding payments already made by appellees to Mid-Atlantic. The trial

court concluded that the claim was therefore filed arbitrarily, vexatiously, or in bad faith. A review of the transcript from that hearing as well as the pleadings contained in the certified record does not support this conclusion, however. Appellant raised constitutional arguments as early as its filing of its answer to the preliminary objections on February 11, 1997. There is no evidence to infer that the action was instituted arbitrarily or in bad faith. Rather, the testimony of the president of the company was clear and unwavering that he intended from the beginning to pursue the constitutional right of a sub-subcontractor to file a mechanics' lien claim.

Appellant sets forth in great detail in his brief a discussion of similar mechanics' lien statutes of several sister states, as well as the judicial interpretations given to those laws. As noted by the panel of this court in *Patrick McGuigna Roofing Co., Inc. v. Kallman*, 592 A.2d 1368 (1991), legislative reform of the Mechanics' Lien Law may be appropriate at this time. However, although we recognize that any modification or expansion of the statute is a decision to be made by the legislature, appellant should not be punished for advancing the argument that the statute as it presently exists is unconstitutional. There is no basis on this record to conclude that the novel contentions raised, although without merit, were made arbitrarily, vexatiously, or in bad faith, so as to warrant imposition of attorney fees. We therefore conclude that the imposition of sanctions in this case was an abuse of discretion.

The portion of the order sustaining appellees' preliminary objections and striking the mechanics; lien claim is affirmed. The portion of the orders granting the motion for sanctions and awarding attorney fees to appellees is vacated. Jurisdiction relinquished.

SCHILLER, J., files a Concurring Statement.

CONCURRING STATEMENT B SCHILLER, J.:

I concur in the result reached by the majority. However, I write separately to express my view that the reform measure sought by Appellant, i.e. the expansion of the present Mechanics' Lien Law to enable second-tier subcontractors to file mechanics' liens, raises an important question as to the pertinence of a law enacted *more than thirty years ago* with respect to modern day construction contracts. As Appellant points out, under the current state of law, numerous specialized subcontractors are precluded from filing liens to assure payment for their materials and/or service. However, this Court is not the appropriate forum to seek expansion of the law. *See Delmont Mechanical Services, Inc. v. Kenver Corp.*, 677 A.2d 1241 (Pa. Super. 1996) (Mechanics; lien law is a creature of statute in derogation of common law and must be given strict construction; thus any questions pf interpretation should be resolved in favor of a strict. narrow
interpretation). Consequently, if the law is to be revised, that revision is a legislative function. However, while the issue was not presented to this Court, there may be a fundamental right involved which Appellant may wish to pursue in a higher court.

BEFORE: JOHNSON, SCHILLER and BROSKY, JJ.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Montgomery County be, and the same is hereby AFFIRMED FOR THE PORTION OF THE ORDER SUSTAINING APPELLEES PRELIMINARY OBJECTIONS AND STRIKING THE MECHANICS' LIEN CLAIM. THE PORTION OF THE ORDERS GRANTING THE MOTION FOR SANCTIONS AND AWARDING ATTORNEY FEES TO APPELLEES IS VACATED. JURISDICTION IS RELINQUISHED.

BY THE COURT:

/s/ _____
PROTHONOTARY

DATED: March 11, 1999

APPENDIX B.

FEBRUARY 26, 1998 ORDER OF THE TRIAL COURT, THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA.

AND NOW, this 26th day of February, 1998, after an evidentiary hearing regarding the imposition of sanctions, oral argument, a review of the pleadings of the parties, and upon detailed consideration [sic] the legal arguments presented by the parties, it is hereby ORDERED and DECREED that:

A. The Preliminary Objections to the Mechanics' Lien Claim are ruled on as follows:

1. Defendants' Preliminary Objection #1 in the nature of a Motion to Strike for lack of standing as a sub-subcontractor to file the Mechanics' Lien Claim is SUSTAINED.

2. Defendants' Preliminary Objection #2 in the nature of a Motion to Strike because the Mechanics' Lien Claim was filed in violation of the Recorded Lien Waiver is SUSTAINED.

3. Defendants' Preliminary Objection #3 in the nature of a Motion to Strike for failure to comply with the thirty-day notice requirement is DISMISSED AS MOOT in light of the rulings on Preliminary

Objections #1 and #2.

B. The PROTHONOTARY'S OFFICE is DIRECTED to immediately strike the Lien Claim from the Mechanics' Lien Docket and from the Judgment Index and DIRECTED to mark the proceedings closed and discontinued with prejudice.

C. Defendants' Request for Attorneys Fees as Sanctions is GRANTED, as the Court finds:

1. The above-captioned Mechanics' Lien Claim was filed in express violation of the statutory prescriptions set forth in the Mechanics' Lien Law of Pennsylvania. Plaintiff's present challenge to the Mechanics' Lien Law appears to be simply an extension of its persistent lobbying of the state legislature and not truly a constitutional challenge. The constitutional challenge itself is merit less.

2. The Lien Claim was filed without any reasonable basis at law and was an arbitrary action brought to collect payments that were not due from the Owners/Defendants to the Claimant/Plaintiff. Anthony Fizzano, President of Fizzano brothers testified at the evidentiary hearing that the filing of a Mechanics Lien might cause a bank to stop disbursing funds for a

construction project and that he knew prior to furnishing labor and materials to Laad Masonry and prior to filing the Mechanics' Lien that:

a. The construction project was a waiver of liens project;

b. Fizzano Brothers was a third-tier contractor which was not entitled under the present provisions of the Mechanics' Lien statute to file a Mechanics' Lien against the owner of the property because of the waiver of liens which had been filed;

c. Laad Masonry, which was contractually obligated to pay Fizzano Brothers for labor, concrete [blocks] and scaffolding for the project, was not a good credit risk;

d. The general contractor would not do a "joint check" agreement to protect Mr. Fizzano's company from the possibility that Laad Masonry would default on its duty to pay Fizzano Brothers.

3. After being advised by the Owners/Defendants of the statutory

defects with the Lien Claim, the Claimant/ Plaintiff failed and refused to strike off the Lien Claim.

4. The refusal by the Claimant/ Plaintiff to strike off the Lien Claim caused the Owners/ Defendants to incur substantial legal expense to obtain the entry of an Order striking off the Lien Claim.

5. It appears that the imposition of sanctions under 42 Pa.C.S.A. §2503(9) is appropriate because of Plaintiff's abuse of the Mechanics' Lien procedure.

D. It is hereby ORDERED and DECREED that Defendants are awarded reasonable attorneys fees in the amount of $31,364.50 which constitutes the following:

1. $17,952.50 listed in Exhibit D-2 (defense counsel's time diary through oral argument on the Preliminary Objections).

2. $12,347.00 listed in Exhibit D-3 (defense counsel's time diary through the date of the September order through to the date of the evidentiary hearing on the issue of the sanctions).

3. $720.00 for three hours of William Maffucci's time spent at the

evidentiary hearing (at $240.00 per hour).

4. $345.00 for three hours of Andrew Lambert's time spent at the evidentiary hearing (at $115.00 per hour).

E. The award of attorneys fees in paragraph D above is made without prejudice to Defendants' right to request sanctions in the future. Such sanctions may include but are not limited to the imposition of attorneys fees against both Plaintiff and counsel with joint and several liability. E.g., Menna v. Agnes Medical Center, 456 Pa.Super. 301. 690 A.2d 299,304 (1997).

BY THE COURT:

/s/ Rhonda L. Daniele
RHONDA L. DANIELE, J.

APPENDIX C.

MARCH 11, 1998 ORDER OF THE TRIAL COURT, THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA.

AND NOW this 11th day of March, 1998, paragraph D of the Order dated February 26, 1998, is hereby clarified to reflect that in granting the Motion for Sanctions the court intended that Plaintiff and Plaintiff's counsel are jointly and severally liable for the attorneys fees in the amount of $31,364.50.

BY THE COURT:

/s/ Rhonda Lee Daniele
RHONDA LEE DANIELE, J.

APPENDIX D.

AUGUST 26, 1999 ORDER, PER CURIAM, THE PENNSYLVANIA SUPREME COURT

ORDER

PER CURIAM:

AND NOW, this 26th day of August, 1999, the Petition for Allowance of Appeal and the Cross-Petition for Allowance of Appeal are hereby DENIED.

TRUE AND CORRECT COPY
ATTEST: AUG 26, 1999

/s Shirley Bailey
SHIRLEY BAILEY
CHIEF CLERK